IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 139 of 1999

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

and

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KIRITBHAI KANUBHAI DESAI

Versus

STATE OF GUJARAT

Appearance:

MR SHAKIL S SHAIKH for Appellant

MR MA BUKHARI APP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

and

MR.JUSTICE A.L.DAVE

Date of decision: 08/11/2000

ORAL JUDGEMENT (Per : MISS JUSTICE R.M.DOSHIT)

This appeal arises of the judgment and order dated 4th February, 1996, passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No. 45/98. The appellant before this court is accused no. 1 who has been convicted for the offence punishable under section 302 IPC and is sentenced to RI for life, and a fine of Rs.3000/-. Further RI for six months has been imposed in case of default of payment of fine.

The accused no. 1 is the husband of the deceased Mayuriben and the accused no.2 is brother of the accused no.1. Both the accused and their wives were residing in an apartment house known as 'Dollar Avenue'. The apartment was a duplex apartment. The upper portion was occupied by the accused no.1 and his wife deceased Mayuriben and the lower portion was occupied by the accused no.2 the brother of the accused no. 1 and his wife Ritaben. At the time of the death, the deceased Mayuriben was reported to be nine months' pregnant. On 19th September, 1997, at around 9-00 O'clock in the morning, the parents of the deceased Mayuriben who were residing at Pij, District-Kheda, received a message that Mayuriben had died. The parents of the deceased Mayuriben and some of their relatives immediately proceeded to Vadodara and came to the residence of the accused no. 1 and the deceased Mayuriben. They found that the deceased Mayuriben was lying on a bed and was covered with a cloth. They suspected a foul-play and reported the death to the police, whereby case for accidental death was registered and the Post-mortem was performed. Upon the report of the Post-mortem, it was learnt that the death of the deceased Mayuriben was a homicidal death and accordingly, a case was registered against both the accused for offences punishable under sections 302, 323, 201, 176 and 34 IPC. Both the accused were tried by the learned Additional Sessions Judge, Vadodara in Sessions Case No. 45/98. The presence of the accused no. 2 at the place of the incident was not established and was accordingly acquitted. The offence under section 201 IPC also was not established against the accused no. 1 and accused no. 1 was acquitted of the said offence. However, offence under section 302 IPC was established against the accused no.1 and has accordingly been convicted and sentenced to RI for life. Feeling aggrieved, the accused no.1 has preferred the present appeal.

Mr. Shaikh, the learned advocate appearing for the appellant-accused no. 1 has submitted that there is

no evidence against the appellant which should lead to his conviction. There being no eye witness of the incident, conviction is entirely based on circumstantial evidence. The evidence on record suggests two possibilities, that is, (1) the appellant had hit the deceased Mayuriben which resulted into her death, and (2) the deceased Mayuriben had suffered a fall as suggested by the appellant and she sustained the injuries which resulted into her death. There being two possibilities, the one which favours the appellant, should be believed and the appellant should be acquitted of the charge. He has further pointed out that the prosecution has failed to establish the time of the death and the cause of the death. Even the motive of the death was not established. In absence of proof of such material facts, the conviction of the appellant could not have been recorded. He has taken us through the entire record and has pointed out that the evidence of the parents of the deceased Mayuriben PW-1 and PW-2 is not reliable, in as much as the statements made before the court were not made before the police or in the complaint lodged before the police. He has further submitted that at the most, there can be a suspicion against the appellant, however, suspicion can not take place that of a proof and in absence of the proof, the conviction recorded against the appellant requires to be set aside. He has also relied upon the evidence of the doctor Shri Kishor P Desai (PW-9) who performed the postmortem on the dead body of the deceased Mayuriben, and the Inquest Panchnama. He has submitted that the injuries which have been recorded by Dr.Desai (PW-9), were not found on the body of the deceased in the Inquest Panchnama. Further he has submitted that even Dr. Desai (PW-9) had admitted that the injuries which were suffered by the deceased Mayuriben could have been caused by a fall. In view of this evidence of Dr.Desai (PW-9) also, the possibility of the deceased Mayuriben having suffered injuries because of fall should be believed and the conviction under section 302 IPC recorded against the appellant should be set aside. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of RAM DAS VS STATE OF MAHARASHTRA (AIR 1977, SC 1164), and of this court in the matters of MAHENDRA SHAMALDAS SONI VS STATE OF GUJARAT (1993 {2} GLH 793); TANVIBEN PANKAJKUMAR DIVETIA VS STATE OF GUJARAT (1997 {1} GLH 851; and STATE OF GUJARAT VS SATWARA K. MAVJI (1997 {2} GLH 496).

Mr. Bukhari, the learned APP has submitted that the evidence on record establish one and only one conclusion that the deceased Mayuriben had suffered the injuries which caused her death due to the appellant

having hit her. There is no possibility of two inferences and the question of selecting one which favours the appellant does not arise. He has submitted that the nature of injuries suffered by the deceased Mayuriben rules out the possibility of the same having been caused by a fall in bathroom as suggested by the accused-appellant. Further the behaviour of the appellant is not natural in as much as though the deceased Mayuriben had suffered severe injuries and was bleeding profusely, no doctor was summoned nor was she taken to the Hospital or to any other doctor for medical treatment. Nobody was informed, either the neighbours or the relatives, about the fall in the bathroom. The fact that the deceased Mayuriben had suffered fall in the bathroom in the early morning, was suggested for the first time during the investigation. Further, indisputably and admittedly, the appellant-accused no. 1 was the only person who was present in the house along with the deceased Mayuriben. In view of this evidence, only possible conclusion is that of the guilt of the appellant-accused no.1 and the conviction recorded by the learned trial Judge requires to be confirmed. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of PRABHUDAYAL & ORS VS STATE OF MAHARASHTRA (AIR 1993 SC 2164).

In the matter of Ram Das (supra), the Hon'ble Supreme Court has held that - " Where circumstances are susceptible of two equally possible inferences, the Courts should accept that inference which favours the accused rather than an inference which goes in favour of the prosecution. .... that the circumstances must be of a conclusive nature and tendency so as to be totally inconsistent with his innocence and are not explainable on any other hypothesis except the guilt of the accused". In the matter of Tanviben Pankajkumar Divetia (supra), while discussing the conviction based on circumstantial evidence, the Hon'ble Supreme Court has said that -" .. the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. The court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events

must be such as to rule out a reasonable likelihood of the innocence of the accused. .... It has been held that the court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions ".

In the matter of Mahendra Soni (supra), on facts, this court found that the motive regarding the demand of a gold locket and cash loan was not established, nor was presence of the accused with the deceased at the place and time of death was established. On the said facts, the order of conviction was reversed.

In the matter of Satwara K. Mavji (supra), the court held that the circumstances created a strong suspicion against the accused. However, there is no positive evidence to show that out of the two accused who committed the crime and the possibility of the involvement of the other inmates of the house also was not ruled out. The court, therefore, held that - " This court can not stretch its imagination, reasoning by bridging the gap between suspicion and truth even if the gap is hairbreadth unless of course our conscience was fully satisfied in the said regard ".

In the matter of Prabhudayal (supra), the Hon'ble Supreme Court has recorded some of the essential ingredients to prove guilt of an accused person by circumstantial evidence, which are as under :

(1) the circumstances from which the conclusion is drawn should be fully proved ;

(2) the circumstance should be conclusive in nature;

(3) all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence;

(4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

In the present case, though the deceased is alleged to have died in the early morning, her parents

were not informed about her death before around 9-00 O'clock in the morning. Upon seeing the dead body, the parents of the deceased Mayuriben PW-1 and PW-2 suspected a foul-play, however, since they were told that the deceased Mayuriben had suffered a fall in the bathroom, an accidental death was registered by the police and investigation was accordingly directed. However, on receipt of the Postmortem report, claim of accidental fall in the bathroom was found to be unsustainable and accordingly an offence under section 302 IPC was registered against the accused nos. 1 and 2 and a fresh investigation was directed to the Investigating Officer Deol (PW-18). The Postmortem note Ex.27 has recorded as many as 7 injuries on the body of the deceased Mayuriben. She had suffered two contused lacerated wounds on each side of the head behind each ear. Moreover, she had also suffered one incised wound in the middle of the head, she also suffered one contused lacerated injury in the middle of the head, she had also suffered two contusions on the right hand one each on the wrist and the fore-arm. She had also suffered contusions on right iliac and left iliac and anterior abdominal wall and one abrasion in the middle below umbilicus. She was also found to be 7 months pregnant. The foetus had died. The cavity was filled with blood and clots and the deceased had bled profusely. The Medical Officer had opined that the injuries on stomach could have been caused by kicks. The umbilical cord can be snapped by such kicks and in such case, the foetus would die. He has also opined that injuries on the head can be caused by the muddamal article no.7 Teapoy. He has also opined that such injury can be caused by a fall. However, all these injuries could not have been caused by one single fall. It is pertinent to note that the blood-stained Payjama of the deceased Mayuriben was cleaned and was found from the house of the deceased and the appellant-accused no.1. No blood was found either in the bathroom or anywhere in the room on the floor. The only blood that was found was on the mattress, bed-sheets and pillow covers and the muddamal article no. 7 Teapoy. The presence of human blood of Group-A on the pants of the accused, Payjamas of the deceased, Kurta of the deceased, muddamal teapoy and pillow cover has been proved by the FSL report (EX-45). Besides, the conduct of the appellant-accused no.1 was also not natural. If the deceased Mayuriben was injured of a fall, as suggested by the appellant-accused no.1, the normal reaction of any person would be to summon a doctor or to take the injured person to a doctor immediately. However, neither of these has been done by the appellant. Neither a doctor was summoned to examine the deceased or to treat her, nor she was taken to a

hospital or any other doctor for treatment.

Considering the medical evidence on record, it is not possible to hold that the deceased Mayuriben had died of an accidental fall as suggested by the appellant-accused no.1, nor it is possible to hold that the deceased Mayuriben died of any reason other than that of homicidal death. As discussed hereinabove, the appellant-accused no.1 was the only person who was present in the house alongwith Mayuriben and his presence is an admitted fact. The only possible inference which could be drawn is that it was the appellant-accused no.1 who caused fatal injuries to the deceased Mayuriben to which she succumbed. The conviction based on such evidence, therefore, does not warrant interference. There being no possibility of two inferences, selecting one which favours the accused does not arise. The circumstances definitely prove that the deceased Mayuriben died of a homicidal death and the appellant-accused no. 1 is the person who caused the fatal injuries to the deceased Mayuriben. It is true that the motive for commission of the offence has not been proved. However, in view of the definite conclusion which can be drawn, the absence of the motive should not have an adverse effect on the case of the prosecution. In our opinion, the prosecution has successfully established the guilt of the appellant. The chain of circumstances connects the appellant with the offence. We have also considered the points raised by the defence, but are unable to accept the same for the reasons stated in the foregoing discussion.

Appeal is dismissed. The conviction and the sentence of the appellant accused no.1 Kiritbhai Desai are confirmed.

(MS R.M.DOSHIT J)

(A.L.DAVE J)

JOSHI